Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-1286

PITT RIVER TRIBE OF INDIANS,

Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY, THE HEARST CORPORATION, KIMBERLY-CLARK CORPORATION, PUBLISHERS FOREST PRODUCTS, DIAMOND INTERNATIONAL COMPANY, FRUIT GROWERS SUPPLY COMPANY, U. S. PLYWOOD CORPORATION, and SOUTHERN PACIFIC LAND COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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PUBLISHERS FOREST PRODUCTS,	)
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FRUIT GROWERS SUPPLY COMPANY,	)
U. S. PLYWOOD CORPORATION, and	)
SOUTHERN PACIFIC LAND COMPANY,	)
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PETITIONER'S REPLY BRIEF

Appellees have filed three Opposition Briefs. We will reply to them jointly.

On the 1851 Act

We point out that the Opposition utterly fails to reply to our facts and argument establishing that Congress did not intend, or even contemplate, any extinguishment of Indian Title except in the Section 16 situations.

They would have the Court believe that the Barker and Title Insurance courts were indifferent or hostile to Congress' intention.

They ignore the precise language of Cramer adopting the specific argumentation of the Solicitor General that Indian Title was not extinguished if the Indians in that case were on the land in 1851-1853.

So they offer no reconciliation of Barker, Title Insurance and Cramer because on their theory no reconciliation is possible.

They ignore the argumentation of the Solicitor General in Title Insurance and Cramer which of course is still relevant in a non-Section 16 situation.

None of the briefs spells out its argumentation, but they do introduce some elements which we will assume were intended as support of their position.

They refer to Super v. Work which adds

nothing to the basic argument on extinguishment of title, for three reasons. Number one is the ambiguous authority of a per curiam decision without evidence of the Court's thought processes or documentation. Number two is the very inadequate briefing by appellant in that case. Outside of the contention that Barker and Title Insurance were wrong and should be overruled, the only argument by appellant was that its claim was tribal and the claims in Barker and Title Insurance were not. Number three is the inability to reconcile Super with either Cramer or the demonstrated Congressional intent.

The next element which, presumably, is intended to oppose our contentions is what has been called the "rule of property". For this "rule" Title Insurance is quoted. Title Insurance in turn quotes from Minnesota Mining v. National Mining, 3 Wall. 332 and the quotation shows its irrelevancy

to our case. In Title Insurance the Government was, and in our case we are not, attempting to persuade this Court to "vacillate and overrule their own decisions". And when we read the facts of Minnesota Mining it is crystal clear that this doctrine has no application. Minnesota Mining did not involve a different factual situation which, it was claimed, required a different ruling. It involved the identical situation and even the same parties. So the "rule of property" is not a means by which the Supreme Court ties itself down to formulas and generalizations. It is simply stare decisis with a modern name.

The next element which, presumably, is intended to oppose our contentions is the extinguishment by the sword doctrine (citing Johnson v. McIntosh). We submit this is irrelevant since we do not contend that Congress intended by this guise (1851 Act) to extinguish Indian Title. Furthermore,

we wonder why, especially in this Bicentennial year, it is necessary to continue the rhetoric of "we could take Indian land by the sword but we do not intend to". Relations between Indians and the Government, and the image of the Government, might be improved if we stopped flaunting our strength especially in a discussion of whether the Government has kept its word.

The final element which, presumably, is intended to oppose our contentions is an itemization of the "largesse" of the Congress in dealing with California Indians. Since they go outside the record (and even the logic) why should we not - in order to make a necessary correction?

Reservations have been created in California constituting about 5% of the land and consisting according to all Government reports of almost worthless land - so that most of the eligible Indians cannot or will not live on it.

And for a California which at the time was considered the most fertile land on the continent and which included a billion and a half dollars in gold, individual California Indians received 47 cents an acre. When reduced by the ineligibles on the roll and further reduced because of their large land area per Indian, appellant's members (the very few who were willing to accept the money) were paid off at the rate of about 10 cents an acre. In any event, how does this prove that Congress intended in 1851 to extinguish Indian Title?

Appellees do not deign to mention our legal argument that extinguishment for failure to file a claim cannot take place if claim filing was prevented by fraud and violence. They do mention it as a political argument and refer appellant to Congress for redress.

Is this Indian law? Anything goes? Whether Congress so intended, or not?

If so we had better be frightened? Felix Cohen, the great Indian law scholar (so described in two Supreme Court opinions) said that the rights of the Indian are like the miner's candle for the rest of us.

This brings us naturally to our contention that even if Congress intended the extinguishment of Indian Title in California and even though, as an abstraction, Congress has power to do so, this does not mean that there is no constitutional limitation to the exercise of the power in an individual case. The demand we made for a "constitutional fact" hearing demonstrates that this is that case, if there be any. Even if there is doubt of the existence of constitutional limitations, is there not sufficient possibility so as to require an avoidance of the constitutional challenge by the contended-for interpretation of the 1851 Act.

Appellees meet the constitutional challenge in two ways. One is to refer appellants to Congress (as if that were the approved forum for interpreting the Constitution). The other is a reference to Tee-Hit Ton; but all that decision held was the non-requirement of compensation in the taking of Indian title. The Court limited its ruling by this statement:

> "This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force." (348 U.S. 273)

Appellants are not litigating for compensation, but for their land.

One of the Appellees' briefs attempts to intimidate the Court with the threat that a ruling in Appellants' favor "would truly create a financial and political disaster". Let us analyze this. The first thing they are saying is that the Court should dishonestly overrule the Indians' contention solely because of financial

embarrassment to corporations or the government. If Appellant's position is not legally sound this argument could not logically be made and would not have to be made.

After saying many times over that Congress can take away Indian land without their consent, are they now going to deny that Congress would have the power (or the statesmanship) to deal with the results of a decision favorable to Appellant?

In any event Appellant would have several obstacles to overcome in the trial court. This is pointed out in the Government's brief in Title Insurance:

> "The disastrous effect on titles anticipated as the result of a reversal is imaginary.
>
> This of course is entirely outside the record. But, even if it were relevant, a case like this, where Indian possession continues in the spot where it has immemorially existed is one in a thousand. California Indians, where not on reservations, are scattered hither and yon and buffeted from

> pillar to post, and the instances where it would be possible to prove long-continued possession, or to negative the idea of abandonment are few indeed."

The Cramer Cause of Action

Appellees claim Appellants are not entitled to a trial because they did not allege certain specifics such as buildings, fences, agriculture, etc., that they claim are required to take advantage of the type of property or cause of action created by this Court's decision in Cramer v. United States, 261 U.S. 219. As we pointed out in our Petition,we did not allege these specifics because they might or might not apply to the many separate Cramer claims involved in this litigation. Furthermore we do not have Appellees' crystal ball. All we can do is read Cramer carefully and thoughtfully. Let us see what Cramer has to say on the subject.

> "Here the claim for the Indians is based on occupancy alone, and the extent of it is clearly fixed by the enclosure, cultivation and improvements. The evidence does not disclose any act of dominion on their part over, or any claim or assertion of right to, any lands beyond the limits of their actual possessions as thus defined. Under the circumstances, their rights are confined to the limits of actual occupancy and cannot be extended to other lands never possessed or claimed, simply because they form part of the same legal subdivisions."

Is not the Cramer Court clearly saying that the right of the Indians depends upon the "occupancy", whereas the evidentiary facts (inclosure, cultivation and improvements) are proof of the occupancy and of the specific area occupied? Could we not have alleged a Cramer-type property right by simply alleging"occupancy"? We went further, and also alleged whatever (if anything) is contained in the "principle enunciated in Cramer v. United States, 261 U.S. 219."

On at least one occasion this Court has spoken out against the theory that in order

to be entitled to a trial a plaintiff must allege the specific facts of the specific case. In United States v. Employing Plasterers, 347 U.S. 186, 188 the Court says:

> "And the court held that there was no allegation of fact which showed that these powerful local restaurants had a sufficiently adverse effect on the flow of plastering materials into Illinois. At this point we disagree. The complaint plainly charged several times that the effect of all these local restaurants was to restrain interstate commerce. Whether these charges be called "allegations of fact" or "mere conclusions of the pleader", we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried..."
>
> "We hold it was error to dismiss the Government's complaint for failure to state a cause of action."

It is clear from the foregoing that the Court of Appeals erred in (a) its definition of, and (b) the required method of pleading, the Federal right established by Cramer. (Pet. App. pg. C-12)

The discussion of this point not only establishes the incorrectness of the ruling below, it also demonstrates why the Petition for Certiorari should be granted on this point. It is perhaps because of the ambiguity of Cramer-type title that so little advantage has been taken of it by Indians; shepardizing discloses only one case (Navaho Tribe v. Utah, 72 Interior Decisions 361).

1853 Act Cause of Action

One of the opposing briefs (Diamond International, et al.) claims that the 1853 Act has been repealed and it offers (in its appendix) the Act of June 2, 1862 to prove it. The logic of the repeal argument eludes us, for all the 1862 Act does is to make the 1841 Act (5 Stat 453) applicable to all lands belonging to the United States to which Indian Title has been extinguished. How does this repeal the 1853 Act, expecially since the 1853 Act incorporates the 1841 Act (Pet. App. pg F-9)?

The other argument made by Appellees is that Appellant cannot challenge their patents because it is a stranger. They cite three cases, and we accept the proposition they stand for, that a stranger is one who had no interest in the land at the time the patent issued. Quoting from their own case, Burke v. Southern Pacific, 234 U.S. 669, 692:

> "cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it."

One of the cases cited by Burke illustrates what this means:

> "a patent is unassailable by any title commenced after its emanation." Hofnagle v. Anderson, 20 U.S. 212, 217

Another of their cases puts it this way:

> "It is for the party whose rights are alleged to have been disregarded that relief is sought." Lee v. Johnson, 116 U.S. 48,50

The beneficiary of a statutory reservation of land for his or its use can obviously go to court to protect against a contradictory, and therefore invalid, patent. See Kissell v. Board of President, 59 U.S. 19.

Conclusion

The Petition for Certiorari should be granted.

Respectfully submitted

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